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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of Illinois (R. 86-99) is reported at 34 Ill. (2d) 164, 214 N.E. 2d 755.

Jurisdiction

This action was brought against appellant to collect taxes alleged to be due from appellant under the Illinois Use Tax Act, as amended (Ill. Rev. Stats. [1963], ch. 120,

§§ 439.1 *et seq.*) and pertinent provisions of the Illinois Retailers' Occupation Tax Act, as amended (Ill. Rev. Stats. [1963], ch. 120, §§ 440 *et seq.*)

The judgment of the Supreme Court of Illinois was entered on January 25, 1966 (R. 100). Notice of appeal was filed in the Supreme Court of Illinois on April 22, 1966 (R. 101). This Court noted probable jurisdiction on October 10, 1966 (R. 106). Its jurisdiction rests on 28 U.S.C. 1257(2) and 2101(c).

Statutes Involved

The Illinois Use Tax Act, section 2, as amended by the Act of July 17, 1961 (Ill. Rev. Stats. [1963], ch. 120, § 439.2) provides in critical part—

> "Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:
>
> 1. . . .
>
> 2. Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Section 3 (Ill. Rev. Stats. [1963], ch. 120, § 439.3) provides in pertinent part:

> The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State . . . and remitted to the Department. . . .

Section 12a (Ill. Rev. Stats. [1963], ch. 120, §439.12a) provides:

Appointment of secretary of state for service of process—Force and effect of service. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made

such service, with a copy of the process or notice that was so served attached to such affidavit.

Related sections of the Illinois Use Tax Act are reprinted in Appendix A, pp. 46-54 below.

Question Presented

Whether it violates the commerce clause or the Fourteenth Amendment for a State to make an out-of-State mail-order house, with no property, offices, warehouses, or agents or other representatives within the jurisdiction, liable for collection of the tax levied upon its customers' use of goods where its only contact with the State is (a) addressing catalogs to local residents through the United States mail and (b) sending the goods to local customers by mail or common carrier.

Statement

1. *The Illinois Use Tax*

Since 1955 Illinois has levied a use tax upon the privilege of using in Illinois "tangible personal property purchased at retail . . . from a retailer." Ill. Rev. Stat. [1963], ch. 120, § 439.1 *et seq.* The statute provides that the use tax shall be collected from the purchaser by any retailer "maintaining a place of business in this State," and makes the obligation a debt of the retailer regardless of whether the tax is actually collected *(Ibid.)*

The term "retailer maintaining a place of business within this State" was originally given a conventional meaning requiring some local establishment such as an office, distribution house, sales house or warehouse. On July 17, 1961 Illinois expanded the term "maintaining a place of

business'' artificially to include (Ill. Rev. Stat. [1963], ch. 120, par. 439.2)—

> Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Illinois also added to the Use Tax Act a new Section 12a providing that any non-resident "who accepts the privilege . . . of acting as a retailer maintaining a place of business in this State'' shall be deemed to appoint the Secretary of State his agent for the service of process in any proceeding under the Act. Service was to be made by delivering a copy to the Secretary of State and mailing a copy to the taxpayer. Ill. Rev. Stat. [1963], ch. 120, par. 439.12a.

2. *Appellant's Business*

The new, artificial definition brought appellant within the reach of the statute, if constitutional. Appellant is a national mail order concern incorporated in Delaware, whose only offices and warehouse are located in Missouri (R. 19, 32-33, 55, 68-69). Twice a year appellant mails catalogs from Missouri to a list of over five million customers resident throughout the United States (R. 68-69). It also mails out and encloses in merchandise smaller intermediate sales books and flyers (R. 70). All orders are received and accepted in Missouri (R. 70-71). All goods are shipped from outside Illinois either by mail or common carrier (R. 70).

Appellant has no other contact with Illinois. It is qualified to do business only in Delaware and Missouri. It has never registered with the Illinois Department of Revenue

under the Use Tax Act. As noted by the court below, it "does *not* maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does *not* have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells; it does *not* own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has *not* advertised its merchandise for sale in newspapers, on billboards or by radio or television in Illinois" (R. 87, emphasis added).

On January 21, 1963 appellee issued a proposed assessment in the sum of $74,593.75 for "delinquent" Use Taxes for the period July 17, 1961 through October 31, 1962, plus a 25 percent penalty of $18,648.43, for a total of $93,242.18. The period of the assessment thus began the day of the enactment of the critical amendment to the Use Tax Act and included sales based upon catalogs distributed prior to the amendment. Defendant declined to pay (R. 5-8, 63).

3. *Proceedings Below*

This action was thereupon instituted by appellee in the Circuit Court of Cook County on October 15, 1963 to recover from appellant the use taxes assessed as above (R. 1-11). Service was made by leaving a copy of the summons and complaint with the Illinois Secretary of State and mailing a copy to appellant in Missouri in accordance with the 1961 amendment to Section 12a of the Illinois Use Tax Act (R. 11-12).

By special appearance appellant challenged, under the Fourteenth Amendment, the power of the circuit court to render an *in personam* judgment on the basis of such substituted service and notice by mail to a defendant whose only contact with Illinois was sending catalogs, advertising

flyers and merchandise into the State from outside the jurisdiction (R. 18-19, 23, 32-34). Although the motion to quash the process was denied, appellant preserved its objection to the jurisdiction throughout the proceedings in the Illinois courts (R. 88-89, 93).

By its motion to strike or dismiss the complaint (R. 38, 43-52) and again by its answer (R. 54, 56), appellant raised the constitutional contention that the Use Tax Act, insofar as it makes appellant liable for the use tax upon Illinois purchasers, is: (i) a denial of due process of law under the Fourteenth Amendment because appellant has not sufficient minimum relation to Illinois to furnish jurisdiction to regulate or tax; and (ii) violative of the commerce clause because requiring appellant to collect the tax imposes an undue burden upon interstate commerce. The circuit court entered summary judgment on motion of appellee (R. 75-76), and appellant appealed (R. 77 *et seq.*).

The Supreme Court of Illinois considered and specifically rejected appellant's three claims under the United States Constitution. It put its decision squarely upon the ground that (R. 93)—

> the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogs and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders [by such catalogs and advertising] followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

Summary of Argument

A.

Under a consistent line of decisions in this Court a State may not constitutionally require an out-of-State mail-order seller to collect use taxes on sales to local buyers unless the seller has a definite link with the jurisdiction such as retail outlets or other business property, or salesmen or other personnel, within the State. Merely sending advertising and merchandise into the State, by mail or common carrier, as part of a general interstate distribution does not provide the requisite nexus. When it upheld the power of Iowa to require a mail-order seller to collect the local use tax on all sales to Iowa purchasers, the Court put the decision upon the ground that the seller maintained local retail stores; the Court also observed that the situation of out-of-State mail-order firms was different because "unlike respondent, they are not receiving benefits from Iowa for which it has power to exact a price." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 365. Later, where the seller had neither a local outlet nor local representatives, the Court held that to require the out-of-State seller to collect the use tax because it engaged in intensive advertising and made regular deliveries of merchandise within the taxing State, would violate the Fourteenth Amendment. *Miller Bros.* v. *Maryland*, 347 U.S. 340. All the other decisions sustaining obligations to collect use taxes were expressly based upon the presence of local stores or local solicitors.

B.

The line drawn by those decisions is sound in principle. Mail-order sales have long been significant factors in open-

ing the minds and raising the living standards of millions of Americans in communities remote from urban stores. Illinois would restrict this important national market by precluding appellants and thousands of other wholly out-of-State mail-order businesses from sending advertising and goods to Illinois residents as part of a general interstate distribution, unless the out-of-State firms were able and willing to collect taxes for Illinois. The impact will be chiefly upon small, independent enterprises. *Report of the Special Sub-committee on State Taxation of Interstate Commerce of the House Committee on the Judiciary.* H. Rept. 565, 89th Cong., 1st Sess. 770 (1965). For a firm whose advertising ran nationwide, compliance might mean acting as tax collector for every one of the States (now forty-two) with sales and use taxes and also for each of the multitude of local subdivisions that impose use taxes.

Four converging considerations demonstrate that the attempted imposition of this extraterritorial obligation is unconstitutional. *First,* in all cases the obligation would discriminate against out-of-State sellers and interstate commerce. The thesis asserted by Illinois requires out-of-State sellers, unlike local merchants, to comply at one time with the many diverse and often inconsistent laws of different jurisdictions far away from their business locations. *Second,* where the question is one of jurisdiction to tax, the "simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444. Illinois gives appellant none of the benefits of government. Appellant has no stores, no property, no salesmen and no deliverymen in Illinois; nor does it create in Illinois any of the community problems for the solution of which governments must levy taxes. *Third,* the burdens of this extraterritorial obligation fall upon persons outside the State who have no opportunity

to obtain a change of policy through the political process. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 185, n. 2; *Edwards* v. *California*, 314 U.S. 160, 174. *Fourth*, the legislation is not required to protect local merchants against unfair competitive disadvantage.

C.

Even if the conclusion were otherwise doubtful, the Court should not now disturb the distinction between (a) businesses with local representatives or related local outlets, which may be subjected to liability to collect use taxes, and (b) exclusively out-of-State businesses, which are immune. The distinction is firmly embedded in business practice and use tax administration. Collection or payment of a use tax in a State where a firm does only a mail order business is virtually unknown. *Report of the Special Subcommittee, etc.*, H.Rept. 565, 89th Cong., 1st Sess. 772. In practice, most State tax administrators have accepted the distinction. *Id.* at 630. After careful study the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on Judiciary found that legislation should be adopted to eliminate "the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting tax." *Id.* at 884. The full House Committee on the Judiciary has now reported legislation which would preserve the *status quo* with respect to mail order sellers by barring the States from requiring the collection of use taxes by sellers who have no permanent business location within the State. H. Rept. 2013, favorably reporting H.Rept. 16491, 89th Cong., 2d Sess. (1966). The established rule should not be upset by judicial

decision in the face of the Court's own precedents, the operating practice and the recommendations of the congressional committee specifically charged with studying the question.

Argument

Illinois Lacks Constitutional Power To Require Collection of Its Use Tax By An Out-of-State Mail Order Business

Illinois seeks, in effect, to compel out-of-State firms to stop using the mails to send advertising and goods to Illinois residents unless they are willing to undertake the extraterritorial obligations of collecting taxes for Illinois and of paying the tax when they cannot collect it. Local merchants whose property and business activities are carried on under the protection of the State government must contribute to its cost. Those interstate traders who gain the benefits of local government through their use of stores or other property, or salesmen or other representatives, within the jurisdiction, may also be required to contribute a fair share of the cost. We submit, however, that the very concept of a national market, which underlies both the commerce and due process clauses, requires that a business whose property and activities are located in one State should be allowed freely to communicate with and ship goods into others without incurring extraterritorial obligations in return for which they receive neither benefits nor protection. The issue in this case lies between the national interest in a free interstate market and the forces of parochialism seeking new sources of revenue and commercial protection in the imposition of extraterritorial obligations.

The Court has long recognized the need to protect the

national economy against State laws imposing obligations insufficiently related to activities within the taxing State. The Chief Justice restated the established constitutional doctrine in *American Oil Co.* v. *Neill*, 380 U.S. 451, 458: "when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax." There must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax". It is also settled, as the Chief Justice noted in the *American Oil* case, that the fact that the vendor knows that goods are destined for use within the taxing State is not enough to validate the imposition of tax liabilities in connection with out-of-State sales which are otherwise insufficiently related to activities of the vendor within the taxing State (*Id.* at 457).[1]

In our view, the relevant test of nexus is whether the out-of-State concern has property or representatives carrying on its business within the taxing State. The Supreme Court of Alabama reached this conclusion upon indistinguishable facts. *State* v. *Lane Bryant*, 277 Ala. 385, 171 So. 2d 91. If this is the test, appellant cannot constitutionally be required to collect and pay the Illinois use tax, for it has neither stores, nor property, nor employees, nor other representatives through which it carries on activities within the jurisdiction. Indeed, appellant is so far removed from Illinois that appellee relies wholly upon notice by registered mail and substituted service of process upon the Illinois Secretary of State in order to claim jurisdiction for its courts.[2]

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[1] The opinion cited as examples, *Miller Bros.* v. *Maryland*, 347 U.S. 340 (use tax); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (gross receipts tax); *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327 (sales tax).

[2] Appellant moved to quash the service of process and throughout the proceeding has preserved its right to challenge the jurisdiction

Appellees argue that the mailing of catalogs into Illinois through the United States mails is a sufficient nexus where goods are shipped into the State in response to mail orders. The proposition, as stated in the opinion below (R. 92), is that "the important question is whether there is exploitation of the consumer market by continuous solicitation and not whether the company has used local advertising, brokers or catalogs . . . ." There are already twenty-one sales and use tax States whose statutes attempt to make advertising, by catalog or otherwise, a sufficient nexus (although they have rarely attempted to enforce the obligation).[3] The number of jurisdictions seeking to impose obligations upon out-of-State firms can be expected to grow, for there are forty-two States which impose sales and use taxes.[4] In addition, more than 2,300 units of local government impose sales taxes, many with a compensating use tax. See p. 29 below. The consequence of Illinois' view is to close these interstate markets to out-of-State

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of the Illinois courts to render a judgment imposing in personam liability. In our view appellant does not have such contacts with Illinois as will permit substituted service with notice by registered mail. The absence of such contacts dramatizes the lack of a nexus sufficient to support tax liabilities. We argue only the latter point, however, because, if the contacts were sufficient to support jurisdiction to impose the substantive tax liabilities to Illinois, then they would probably be held adequate for an enforcement action in the Illinois courts. Cf. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220. The burden of making a defense in a foreign jurisdiction is less onerous than the other burdens of acting as an extraterritorial tax collector, and therefore raises a less serious threat to the preservation of an open national market.

[3] H. Rept. 565, 89th Cong., 1st Sess.

For recent additions, see Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts, 1966; New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966; Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950 as amended by ch. 151, Laws 1966; Rhode Island Sales and Use Tax Act, ch. 18 and 19 of Title 44 of the General Laws of Rhode Island, 1956, as amended by H.B. 1730, Laws 1966.

[4] See pp. 26-27, n. 15, below.

firms except as they can sustain the burden of acting as tax collectors for States and municipalities throughout the nation.

Although the exact question has not been decided, the decisions of this Court plainly indicate that an out-of-State firm cannot be required to collect a use tax on interstate sales unless it has some property or representatives within the taxing State. We discuss the relevant cases in the first part of our argument. See pp. 15-21 below. The decision below is not only inconsistent with those precedents but, as we will show next, it violates the fundamental principles of the federal system by asserting unfair extraterritorial jurisdiction and unduly burdening interstate commerce.[8] See pp. 21-39 below. Finally, we show that the settled practice is not to collect use taxes where the seller does only a mail-order business; that most tax administrators have refrained from demanding collection; and that the congressional committee charged with the task has recommended legislation barring extension of extraterri-

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[8] In the present case it is unnecessary to take a position as to whether, as an original matter, the constitutionality of the Illinois statute would be analyzed better in terms of the commerce clause or the due process clause of the Fourteenth Amendment. We cast our argument primarily in terms of the Fourteenth Amendment because the Court has followed that analysis in previous cases. However, two further points should be noted. First, this is not merely a case of invoking the concept of due process as a bar to State taxation of those beyond its borders. A true question of procedural due process is also involved because Illinois has attempted to enforce the challenged substantive obligation by asserting *in personam* jurisdiction over a firm which was not served personally and, which has never been within the jurisdiction. See p. 12, n. 2 above. In all previous cases there was either personal service or an attachment of property. Second, for reasons stated at pp. 21-39 below, analysis in terms of the commerce clause leads to the same result as analysis in terms of nexus and due process. Compare Justice Black concurring in *Central R. Co. v. Pennsylvania*, 370 U.S. 607, 618-622. It is difficult to think of any transaction that is more purely interstate commerce than the mail order sales involved in this controversy.

torial liability to mail-order houses having no business location within the jurisdiction. See pp. 39-44 below.

A. *The established rule is that a State may not impose extraterritorial liability to collect use taxes upon sellers having neither property nor representatives within the jurisdiction.*

This Court's decisions draw a sharp line between mail-order firms which have outlets, property, salesmen or representatives within a State and exclusively out-of-State firms which merely send advertising and merchandise into a jurisdiction by mail or common carrier as part of a general interstate distribution. The former have such contacts with the State as to give it power to require them to collect local use taxes on sales to mail-order customers. Under past decisions the latter cannot constitutionally be subjected to use tax liabilities. In each of the cases sustaining the imposition of liability, the Court stressed the presence of either local outlets or local representatives. The leading opinion acknowledged that the obligation to collect a local use tax could not constitutionally be imposed upon an exclusively mail-order business.[6] Where there was neither a local outlet nor any other local representative but interstate deliveries were made in response to interstate advertising, the Court held that the imposition of the liability would violate the Fourteenth Amendment.[7] The Court has never suggested that the presence of solicitors or other local representatives is immaterial.

(a) *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, upheld a California statute imposing upon an out-of-State seller liability to collect a local use tax in connection with the sale and shipment of goods to local residents where

[6] *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359.
[7] *Miller Bros.* v. *Maryland*, 347 U.S. 340.

the interstate sales were arranged by agents and subagents working in California. The opinion did not discuss the State's power to require the seller to collect the tax, probably because any conceivable doubt upon the point was answered by the continuous presence of the seller's local agents.

(b) In *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, the Court held that a State may require an out-of-State mail-order concern to collect the use tax levied upon its local customers where the mail-order concern also maintains local retail stores, doing a related business, which enjoy the protection and services of the taxing State. The opinion stressed the importance of the seller's local business done through local retail outlets. "Since Iowa has extended it that privilege, Iowa can exact this burden [of collecting the use tax] as a price of enjoying the full benefits flowing from its Iowa business" (312 U.S. at 364). The Court distinguished "out-of-State mail order houses" on the ground that they "are not receiving benefits from Iowa for which it has the power to exact a price" (312 U.S. at 365). Thus, the *Sears, Roebuck* case plainly implies that the mere solicitation of business from outside a State, followed by interstate delivery to local customers, is not a sufficient nexus.

(c) The opinion in a companion case, *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, mentioned local advertising as an element giving the State jurisdiction. The court below erroneously supposed that this was an indication that any regular advertising within the State would provide the necessary nexus. Similarly, appellee argued, in its Motion to Dismiss (p. 3), that "there was an express holding that . . . solicitation by advertising in the state was the equivalent to solicitation by local agents." Both the court below and appellee misread the opinion. The opinion does not speak of "advertising" generally. It speaks of "*local*

advertisements"[8] to describe the advertising by Montgomery Ward's *local* retail outlets.

> It was stipulated that "advertisements have been caused to be printed *by the retail stores* of petitioner (Montgomery Ward and Co.) in the State of Iowa. . . ." [Emphasis supplied.]

The Court continued—[9]

> The fact that such solicitation was done through *local advertisements* rather than directly by *local agents* as in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, is immaterial. [Emphasis supplied.]

Thus, the holding was only that *local advertising* of the mail-order business by the local retail stores was not to be distinguished from face to face solicitation *by local agents*. Advertising of the mail-order business by the local retail stores linked the stores, which were the nexus giving jurisdiction, to the mail-order business, which felt the incidence of the obligation. This is a far cry from the claim that sending catalogs into a State by the United States mail gives that State and every other jurisdiction into which the catalogs are mailed the power to require the out-of-State seller to collect taxes for States in which it has neither outlets nor representatives.

(d) In *General Trading Co.* v. *Tax Comm'n.*, 322 U.S. 335, the retailer sent a sales force into the jurisdiction. The Court again held that *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, was dispositive, because the interstate business was solicited by local agents.

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[8] 312 U.S. at 376.

[9] *Ibid.* One intervening sentence is omitted.

> The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine from without a state as in the *Gallagher* case, compared with the apparently simpler needs for soliciting here.

Manifestly the Court was talking about the local solicitation, which it described in the opinion, not about out-of-State use of the United States mails.

(e) *Miller Bros.* v. *Maryland*, 347 U.S. 340, rejects the argument that jurisdiction to compel an out-of-State firm to collect a local use tax can be predicated upon regular, continuous advertising through interstate media without local stores or local solicitors. Miller's Delaware furniture store advertised its wares in newspapers and over radio stations which consistently reached the neighboring interstate market. As a result of the advertising the store regularly sold furniture to Maryland customers for use in Maryland. It made regular deliveries in Maryland in its own truck driven by its own employees. The Court held that the Delaware vendor could not constitutionally be required to collect the Maryland use tax on these interstate sales.

Miller Bros. v. *Maryland* should govern the present case. Miller's effort to develop the Maryland market was at least as intensive as appellant's advertising in Illinois. Miller advertised its wares in Maryland almost daily, through Delaware newspapers circulating in Maryland. Appellant uses no newspaper advertising that reaches Illinois. Miller sent out regular mailings addressed to Maryland customers four times a year. Appellant mails its regular catalogs twice a year and sends out intermediate sales books and flyers. Neither Miller nor appellant beamed any advertising specifically at the taxing State. On all these points the cases are indistinguishable.

Miller had more contact with Maryland than appellant has with Illinois. Miller regularly sent its own truck and driver into Maryland to make deliveries, and Maryland levied on the truck to enforce payment of the tax. The dissenting justices thought that this contact was sufficient, in conjunction with the advertising, to confer jurisdiction. Appellant sends no one to Illinois; it ships its merchandise by mail or common carrier. Consequently, the view expressed by the dissenting justices in *Miller Bros.* v. *Maryland* is entirely consistent with our position in the present case.[10]

The other differences are immaterial. Miller's customers made an interstate journey whereas appellant's purchasers transmit their orders by interstate mail. The difference can hardly help Illinois. In this context, interstate travel cannot be distinguished from interstate communication. In both cases the sales were completed outside the State and the goods were delivered through the channels of interstate commerce. The volume of business here is larger than in *Miller*, but size alone cannot be the criterion and the stipulation of facts in *Miller* indicates that its business with Maryland customers was both regular and

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[10] The view of the dissenting justices—that the regular household deliveries were sufficient contact to sustain the duty to collect the use tax—is incorporated into a bill introduced by Congressman Willis of Louisiana as chairman of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, on the basis of an unusually careful and detailed study of the consequences of State sales and use taxes. H.R. 16491, 89th Cong., 2d Sess. Sec. 101(2), 511(a), 514. The bill also takes the position we advocate here with respect to mail-order sales by out-of-State sellers; it would expressly bar a State from requiring the collection of use taxes upon mail-order sales by firms having no business location within the jurisdiction and making deliveries only by mail or common carrier. In September 1966 the House Committee on the Judiciary reported the bill favorably, recommending that it be enacted without amendment. Only one of the thirty-five members of the committee objected. H. Rept. 2013, 89th Cong., 2d Sess. (1966).

substantial. Indeed, if the decision below is not reversed, thousands of mail-order firms much smaller than Miller will be subjected to multi-State obligations. H. Rept. 565, 89th Cong., 1st Sess. 770. In Miller some of the goods were picked up by customers at the out-of-State store, but that was not true of the greater part—66 percent—of the business. Miller's deliveries were just as continuous and just as regular as appellant's shipments.

Miller Bros. v. *Maryland* necessarily holds, therefore, that the regular solicitation of orders by the interstate dissemination of general advertising, followed by delivery to local customers, is not sufficient nexus to give a State jurisdiction to require the out-of-State vendor to collect the State's tax on the in-State customers' subsequent use of the goods. So read, the decision gives effect to the earlier statement in *Sears, Roebuck*, that mail-order houses could not be required to collect use taxes when they had neither outlets nor solicitors within the taxing State. Those rulings cover the present case.

(f) The latest precedent reinforces this conclusion. In *Scripto, Inc.* v. *Carson*, 362 U.S. 207, the question was whether Florida had jurisdiction to require collection of a local use tax from an out-of-State vendor because of the physical presence of salesmen carrying on the vendor's business within the State. After noting that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," the Court held (p. 211)—

> We believe that such a nexus is present here. . . . as Florida points out, appellant has 10 wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the resulting order from that State to Atlanta for shipment of the ordered goods.

And the very first point made by Justice Clark in distinguishing *Miller Bros.* v. *Maryland* was that "Miller had no solicitors in Maryland."

The short of the matter, therefore, is that the Court has consistently drawn a line between locally soliciting customers by retail stores, or salesmen however denominated, on the one hand, and, on the other hand, merely sending advertising, such as catalogs, into interstate markets. In the former case the Court has sustained but in the latter situation it has invalidated efforts to require the seller to collect and pay over the buyers' tax. That line of distinction requires reversal of the judgment below.

B. *The rule that the States may not impose upon out-of-State sellers extraterritorial liability to collect local use taxes is sound in principle*

The line of distinction fixed by the foregoing decisions rests upon principles essential to the overriding national policy of preserving open interstate markets. Mail-order sales have long been significant factors in opening the minds and raising the living standards of millions of Americans who lack other access to the kinds of merchandise available in urban stores. Catalog houses offer consumers the economies of volume distribution, assurance of fixed, uniform prices, and also more varied merchandise than most local stores can afford to carry. For years their semiannual publications have stirred the imagination of both adults and children. Mail-order sales also support the development of thousands of small, independent enterprises—often based upon local specialties, such as Vermont maple sugars, New Orleans pralines, and the beautiful Sierra Club publications—where their wares could never find a national market, through other channels of distribution. Interstate traders must pay for the protection which they

receive from a State or local government, but the constitution leaves no room for the States to obstruct interstate markets by imposing discriminatory or extraterritorial obligations upon out-of-State firms having no real connection with the jurisdiction. Since appellant has neither property nor representatives in Illinois, the onerous discriminatory and extraterritorial burdens imposed by the Illinois statute cannot be sustained by pointing to appellant's enjoyment of benefits or opportunities within the jurisdiction. This is also true of other out-of-State mail-order sellers. Accordingly, the sending of advertising or goods into a State by mail or common carrier is not alone a sufficient nexus to permit the State to make an out-of-State business liable for collecting a local tax.

Four converging considerations support this proposition.

1. *The obligation to collect use taxes wherever their customers were located would impose cumulative, and therefore discriminatory, burdens upon out-of-State mail-order businesses.*

In the present case the Court has the benefit of a careful congressional investigation of the actual operation of sales and use tax laws as applied to interstate commerce. The study was conducted by a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives. The reports most relevant to the present case are H.Rept. 565 and 952, 89th Cong., 1st Sess. (1965).[11]

[11] Since the pagination is consecutive through the several volumes despite the different document numbers, we hereafter cite all the volumes as "Report."

The study resulted from mounting concern about the steady expansion of State taxation of interstate transactions. Following the decision in *Northwestern Portland Cement Co. v. Minnesota*, 358 U.S. 450, Congress enacted legislation forbidding a State or political subdivi-

The typical mail order firm sends advertising and goods from a single establishment into a regional or national market. If one State, such as Illinois, can require the firm to collect taxes merely because some of its customers reside in Illinois, then every other State in which it has customers may also impose upon the same firm the burdens of a tax collector. For a firm whose advertising ran nationwide this would mean acting as tax collector for an immediate minimum of twenty-one States and ultimately for forty-two or even fifty.[12]

The inevitable result is serious discrimination against interstate commerce. A retail store normally deals with one set of customers under the laws of a single State. A mail-order house receives orders from many jurisdictions. The latter often faces insuperable practical obstacles in the collection of the tax from a distant customer. See pp.

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sion to tax income derived from interstate commerce by a business whose only activities within the State were the solicitation of orders subject to approval or rejection outside the State to be filled by interstate delivery. The same statute authorized the House Committee on the Judiciary and the Senate Committee on Finance to make full study of State taxation upon income derived from activities in furtherance of interstate commerce. Act of September 14, 1959, 73 Stat. 555 (1959). After *Scripto, Inc.* v. *Carson*, 362 U.S. 207, the authorization was expanded to include study of the impact of State and local sales and use taxes. Act of April 7, 1961, 75 Stat. 41 (1961). The study was conducted by a Special Subcommittee on State Taxation of Interstate Commerce of the Committee of the Judiciary of the House of Representatives. Hearings were held during the 87th Congress. Reports were published during the 88th and 89th Congresses. The reports most relevant to the present case are H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965). Following the study the full Judiciary Committee recommended that the States should be prevented from requiring the seller to collect a use tax upon an interstate sale unless it had a business location within the taxing jurisdiction or made regular household deliveries there otherwise than by mail or common carrier. See H. Rept. 2013 favorably reporting with amendment H.R. 16491, 89th Cong., 2d Sess.

[12] Forty-two States have sales and use taxes. Twenty-one already have some form of catalog or advertising provision. See p. 13, n. 3 above.

28, 59-60 below. Apart from this, if the State laws were uniform and the States would accept one set of records, the cumulative burden might be no more than proportionate to the volume of business. The difficulty results from the variations and inconsistencies in State laws and record-keeping requirements. Congressman Willis, chairman of the Special Subcommittee, graphically described the plight of the typical mail-order enterprise under the theory now espoused by Illinois (112 Cong. Rec. (Sept. 30, 1966) A-5055):

> If it were to anticipate shipping its products into any State, city, county or hamlet from which it received an order, it would require a compilation of 80 volumes of State and local tax laws which reaches more than 22 feet in height when piled one on the other.

The Report discloses—

> in all cases the charging and recording of sales tax is more complicated than in a retail store. One reason is, of course, the many States to which mail orders are sent from a single mail-order plant. [*Report* 771.]
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> * * *
>
> The interstate seller of consumer goods . . . has the same costs as a local firm selling the same types of items *plus the added costs of complying with the laws of many States at once.* [*Report* 812, emphasis supplied.]

Discrimination against the interstate trader would be the inevitable result of allowing States to impose the essentially extraterritorial liability asserted by Illinois. State sales tax laws are and always will be divergent, except as Congress might allow the imposition of an obligation condi-

tional upon adherence to a uniform system. See, *e.g.*, *Report* 1177-1187. The central vice of extraterritorial obligations is that they invariably turn into multiplicitous burdens imposed by many States. The same nexus asserted by Illinois can be claimed by every other jurisdiction in which appellant's mail-order customers are located. The resulting discrimination against interstate commerce is no less relevant because it appears in the actual operation of State laws rather than on the face of the statute. As the Chief Justice observed in *Halliburton Oil Well Co.* v. *Reilly*, 373 U.S. 64, 69—

> In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

See, also, *Nippert* v. *Richmond*, 327 U.S. 416.[13]

The variations in State laws would make the obligation more onerous for interstate mail-order firms than local

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[13] In *Nippert* v. *Richmond*, supra, a flat municipal license fee levied on all persons "engaged in business as solicitors" was held invalid as applied to the itinerant solicitors of out-of-State firms because the cumulative burden of flat annual taxes laid in succession upon the same itinerant solicitor as he passed from town to town would weigh more heavily upon the out-of-State company than upon a local concern operating within a limited area. ". . . the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between these two classes of commerce, generally speaking, impossible" (Id. at 432). Similarly, in the present case, the cumulative effect of a succession of obligations to act as use tax collector for fifteen, thirty or all fifty States, plus many municipalities, would inevitably bear more heavily upon interstate commerce than upon the local merchants who deal only with a single jurisdiction. The very difference between multistate and local trade taken in conjunction with the inherent characteristics of an extraterritorial obligation to act as tax collector makes it impossible, generally speaking, to achieve equality of application.

merchants at each step in the process of attempting to collect the tax.[14]

Variations between the States in the rate of tax increase the burden of computation. The mail-order seller would have to make separate computations on each order according to the customer's residence, for eight different rates are now current among the several States: 2, 2 1/4, 2 1/2, 3, 3 1/2, 4, 4.2 and 5 percent.[15] At best, the requirement would introduce an additional clerical operation into a business the success of which depends upon processing sales simply and cheaply. As the Report noted (p. 771), "sizable firms with broad lines may have to break down their order processing in order to enable clerks to specialize in groups of States."

Exemptions present an insuperable problem. Hardly

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[14] In Appendix B, pp. 55-69 below, we give a more detailed description of the effects of imposing an obligation to collect use taxes upon out-of-State mail-order firms.

[15] *Two percent*: Ind. Ann. Stat. § 64-2656 (Supp. 1966); Iowa Code Ann. § 423.2 (1949); La. Rev. Stat. § 47.302 (1952); Nev. Rev. Stat. § 372.185 (1963); N. Y. Tax Law § 1110; Okla. Stat. Ann. tit.68 § 1402 (1966); Tex. Tax-Gen. art. 20.03 (Supp. 1966); Va. Retail Sales and Use Tax, § 58-441.5 (4 CCH Sales Tax Rep. paras 73.129-73.132 (March 29, 1966).

Two and one quarter percent: N. D. Cent. Code Ann. § 57-40.02. (Supp. 1963).

Two and one half percent: Wyo. Stat. Ann. § 39-311 (Supp. (1965).

Three percent: Ariz. Rev. Stat. Ann. §§ 42-1408 [2%] (1956), 42-1361 [1%] (Supp. 1966); Ark. Stat. Ann. § 84-3105 (1960); Cal. Rev. & Tax Ann. Code § 6201; Colo. Rev. Stat. Ann. § 138-5-6, as amended by H.B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para 26-055 (July 8, 1965)); D. C. Code Ann. § 47-2702 (Supp. 1966); Fla. Stat. Ann. § 212.05 (Supp. 1965); Ga. Code Ann. § 92-3402a (1961); Idaho Code Ann. § 63-3621 (Supp. 1965); Kan. Stat. Ann. § 79-3703 (Supp. 1965); Ky. Rev. Stat. Ann. § 139.310 (Baldwin 1963); Md. Ann. Code art 81, § 373 (1965); Mass. Retail Sales Tax § 2(2), 3 CCH Sales Tax Rep. para. 43-208 (March 15, 1966); Mo. Ann. Stat. §§ 144.020, 144.610; N. M. Stat. Ann. § 72-17-3 (Supp. 1965); N. C. Gen. Stat. § 105-164.6 (1965); Ohio Rev. Code Ann. § 5741.02 (Page 1966); S. C. Code Ann. § 65-

two States provide identical exemptions.[16] Checking the exemptions allowed by each State against the individual items in each order received from one of its residents would be ruinously expensive. The tax might be collected and paid without regard to any exemptions, unless claimed by the customer, but since customers are usually ill-informed, the practical effect is to put those who buy in interstate commerce at a disadvantage in comparison with those who purchase at a local store.

The burden of record-keeping would be multiplied. Separate sales records would have to be kept for every State in which the firm had customers. Twenty-eight sales-tax States require monthly returns; fifteen require returns quarterly.[17]

To undergo multiple audits for different States would be prohibitively expensive, yet State laws require sellers

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1421 (1962); S. D. Code § 57.4303 (Supp. 1960); Tenn. Code Ann. § 67-3003 (Supp. 1966); Utah Code Ann. § 59-16-3 (Supp. 1965); W. Va. Code Ann. § 999(30b) (Supp. 1965); Wis. Stat. Ann. § 77.53 (Supp. 1966).

Three and one half percent: Conn. Gen. Stat. Ann. § 12-411 (Supp. 1966); Ill. Ann. Stat. ch. 120, § 439.3 (Smith-Hurd Supp. 1966); Miss. Code Ann. §§ 10108, 10146-03 (Supp. 1964).

Four percent: Ala. Code tit. 51, § 788 (Supp. 1965); Hawaii Use Tax § 119-2(c), 2 CCH Sales Tax Rep. para 32-418 (April 28, 1966); Me. Rev. Stat. Ann. tit. 36, § 1861 (Supp. 1966); Mich. Stat. Ann. § 7.555(3) (Supp. 1965); R. I. Gen. Laws Ann. § 44-18-20 (Supp. 1965).

Four and two-tenths percent: Wash. Rev. Code Ann. § 82.12.020 (Supp. 1966).

Five percent: Pa. Stat. Ann. tit. 72, § 3403-202 (1964).

[16] For illustrations see Appendix B, pp. 63-65 below.

[17] Monthly returns are required by Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, Washington and Wyoming.

Quarterly returns are required by Alabama, California, Connecticut, Idaho, Iowa, Missouri, Nevada, New York, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia and Wisconsin. See 1 CCH Sales Tax Rep. par. 301.

either to deliver their original books of account to State authorities for audit or else to pay the expense of an office audit, which usually includes the travel, living expenses and fees of two auditors. Basing its conclusion upon the firms of substantial size with respect to which it made a cost study, the Special Subcommittee concluded (*Report* 759):

> Should all sales tax States conduct as much field auditing as does, for example, California, many companies would undergo several audits per year. No matter how accommodating the auditors might be, the resulting situation would entail considerable interference with the personnel and procedures of multistate businesses.

For smaller enterprises, the time, trouble and expense could well be ruinous.

The mail-order seller, unlike the local merchant, bears the burden of paying much of the tax ostensibly levied on his customers. Testimony before the Subcommittee put individual rates of non-collection at 30, 42, 57 and 75 percent. *Report* 771. Appellant is unable to collect the tax on 40 percent of its mail-order sales in the three States in which it has retail stores. See Appendix B, pp. 59-60 below. The resulting tax burden cuts heavily into the margin of profit. Where the tax rate is 4 percent, even a non-collection rate as low as 25 percent would mean that the out-of-State seller was absorbing the equivalent of a one percent tax upon gross sales to that jurisdiction. If the margin of profit before taxes were 4 percent of sales —a pretty good margin for a business depending upon high volume and rapid turnover—one quarter of the gross profit would be dissipated merely by inability to collect the buyer's tax, quite apart from the other costs of acting as tax collector. Where a company was less successful,

the tax burden could well turn what would otherwise be a profit into a loss.

The theory of the decision below would also render a mail-order house with only a single location liable to collect and pay over use taxes for literally thousands of counties, municipalities, and even school and police districts, which directed out-of-State vendors to collect their local use taxes. The number of sales tax localities was 2,329 in 1964. A third of them also imposed compensating use taxes. *Report* 841-845. On top of all the other difficulties of dealing with hundreds of jurisdictions, there would be added the problems resulting from the simple fact that the post office address furnished by a customer does not accurately identify the municipality, county or school (or police) district in which he lives. The only possible conclusion is fairly stated in the Subcommittee's *Report* (p. 882):

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential out-of-State registrants, the record-keeping task of multi-state sellers would be clearly intolerable.

Local taxes aside, it is difficult to epitomize with accuracy the net effect of imposing these discriminatory burdens upon out-of-State mail order businesses under Illinois' theory of nexus. The burden is manifestly substantial. The Subcommittee recommended eliminating—

> the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting the tax. [*Report* 884.]

Beyond this, the degree of the burden depends upon the size and character of the individual business. The few, very large mail-order houses with nationwide outlets have already adapted themselves to seller collection without ruinous cost. The Report observes that, for the major catalog houses, "the responsibility to collect sales taxes causes clerical work and some losses" but that the "problems are small when compared to similar problems handled in the regular course of business." *Report* 772. Later, the Subcommittee observed that the compliance costs were "supportable" by most companies then collecting use taxes outside their home States—chiefly industrial retailers and large catalog houses maintaining nationwide retail outlets. But the Subcommittee added (*Report* 812):

> An exception must be made to this conclusion for the interstate seller in a low volume, low unit price business—typically the small mail-order business. . . . No small mail-order house has been found which collected sales tax for more than one or two States; however, the study of cost relationships in other forms of business strongly indicates caution for cost reasons alone toward extension of the collection responsibilities of this special form of interstate seller.

The major catalog houses which could support the compliance costs comprise "only a tiny minority of all mail-order businesses." *Report* 770. Most of them are already collecting use taxes for the States where their customers reside because of their local operation of retail stores. Efforts to extend jurisdiction to wholly out-of-State firms, therefore, bear primarily upon the very much larger number of very much smaller businesses.[18]

[18] "It must be borne in mind, therefore, that efforts to subject mail-order sales to sales taxation involve not only the few major houses but also a large number of much smaller businesses." *Report* 770.

The Illinois statute is not unconstitutional *solely* because of the unequal financial burden which it puts upon interstate commerce because of "the added costs of complying with the laws of many States at once." *Report* 812. That contention is foreclosed by the decisions holding that a company's mail-order business may be subjected to those costs when it gains the local advantage of the company's use of local solicitors or local retail outlets.[19] The burden is nonetheless important here. In deciding whether there is sufficient "nexus" to support all the States where the customers reside in requiring an out-of-State seller to collect their taxes, the resulting burden must be weighed with the extent of the seller's contacts, if any, with the taxing States. A contact that will support a trivial or slight obligation will not sustain one which is so onerous or so discriminatory as to clog interstate markets. So far as due process is concerned, the controlling question is whether the tax obligation has a proper relation to benefits of local government conferred upon the seller by the taxing States. See *Standard Oil Co. v. Peck*, 342 U.S. 382 and cases cited pp. 32-33 below. From the standpoint of the commerce clause, the burdens become proportionately more serious as the contact with the taxing State diminishes, both because the net balance is more adverse to freedom of the market and because one of the fundamental vices in essentially extraterritorial obligations is that they obstruct the interstate movement of persons, communications and goods. In this respect, the functions of the due process and commerce clauses are overlapping. *Hood & Sons, Inc*, v. *Du Mond*, 336 U.S. 525, 556 (Black, J., dissenting); Brown, *The Open Economy*, 67 Yale L.J. 219, 237 (1958); *Developments in the Law—Federal Limitations on State*

[19] *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373.

Taxation of Interstate Business, 75 Harv. L. Rev. 953, 962 (1962).

2. *Out-of-State mail-order firms receive no benefits from the taxing State.*

Appellant has no property in Illinois to enjoy fire or police protection. It has no salesmen or deliverymen there, using the highways or enjoying the benefits of local government. It carries on no activities in Illinois, for delivering the mails and operating railroads and trucks lines are no part of appellant's business. Nor does appellant create, in Illinois, any of the community problems for the solution of which modern State and local governments must levy taxes. So far as Illinois is concerned, appellant's property, personnel and entire organization are confined to Missouri.[20] In Missouri it enjoys the benefits of local government and bears a share of the cost. Other out-of-State mail-order firms typically occupy the same position. In effect, Illinois and the States which will follow if Illinois succeeds are seeking to impose multiplicitous obligations upon out-of-State firms that enjoy none of the ordinary benefits of government within their jurisdictions.

Since appellant receives none of the benefits of Illinois government, Illinois may not require it to collect or pay taxes. Enjoyment of the benefits of a State government has long been held to be the principal source of its power to tax. In *Lawrence* v. *State Tax Comm.*, 286 U.S. 276, 279 Justice Stone spoke of—

> the most plenary of sovereign powers—that to raise revenue to defray the expenses of government and to

[20] Appellant has retail stores in Alabama, Mississippi and Kansas. It pays use taxes on sales to those jurisdictions. Those local outlets have no connection with its transactions with customers in Illinois.

> distribute its burdens equably among those who enjoy its benefits.

In *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444, in upholding the power of Wisconsin to tax the declaration of dividends by a foreign corporation licensed to do business in Wisconsin, the Court said—

> The simple but controlling question is whether the state has given anything for which it can ask return.

See, also, *Northwestern Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 465 (income tax); *Ott* v. *Mississippi Barge Line Co.*, 336 U.S. 169, 174 (apportionment of property tax); *Standard Oil Company* v. *Peck*, 342 U.S. 382, 385 (apportionment of property tax).

This is also the test heretofore applied to the obligation to collect use taxes upon interstate sales. In *Nelson* v. *Montgomery Ward*, 312 U.S. 373, 375 the Court sustained Iowa's imposing the obligation upon a firm with local outlets and employees, because "the burden which Iowa has exacted [is the] price of enjoying the full benefits flowing from its aggregate Iowa business." Justice Rutledge's concurring opinion in the *General Trading* case took the view that jurisdiction depends upon "tax benefits conferred in general police protection and otherwise." The same theme is expressed in the opinion of the Court. *General Trading Co.* v. *Tax Comm.*, 322 U.S. 335, 338, 356-357. Conversely, in indicating that exclusively out-of-State mail-order businesses need not collect the Iowa use tax upon Iowa sales, the Court pointed out that "they are not receiving benefits from Iowa for which it has the power to exact a price." *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359, 365.

The opportunities for "exploitation of the consumer market," stressed by appellee and the court below, are not benefits conferred by the taxing State. Illinois has no power to bar from her territory either appellant's catalogs or the merchandise shipped to appellant's customers. Appellant's exploitation consists wholly of activities outside the State: (a) depositing catalogs in the United States mails, in Missouri, addressed to prospective purchasers in many States, (b) receiving, in Missouri, money and orders for goods mailed from Illinois and (c) delivering to the United States mails and common carriers, in Missouri, merchandise addressed to customers in Illinois and all other States. The activities of the postal authorities and common carriers in Illinois cannot be said to be appellant's activities. The postal authorities and the common carriers, not the appellant, enjoy any opportunities or advantages that State government confers upon them. *A fortiori* appellant is not the one who enjoys the benefits, opportunities or advantages that the State government confers upon the Illinois purchasers. The only conceivable "benefit" which appellant derives from the government of Illinois is that the ability of Illinois residents to use merchandise under the protection of the State government, after they have bought it, may perhaps give appellant a better market for its goods. Such a benefit is incident to every business transaction between citizens of different States. To recognize it as a basis for taxation would enable every State to reach beyond its borders to tax the other party to any transaction with one of its citizens. A State might then reach out and tax transactions in other States merely because the property was later to be brought into the jurisdiction. That argument was flatly rejected in *American Oil Co.* v. *Neill*, 380 U.S. 451, as destructive of the federal system.

3. Out-of-State mail-order firms have no opportunity to participate in self-government in the jurisdiction imposing the tax.

It is a form of taxation without representation to make an out-of-State firm liable for the collection and payment of use taxes in several States as the price of merely sending catalogs and merchandise into interstate markets. A State must concern itself with the welfare of businesses carried on within its borders. They are part of the common wealth even when owned by non-residents. If they are injured, there is loss to the body politic. Their local operators, managers, and representatives present in the State may vote and otherwise participate in the political process; they may make their weight felt by State officials. Thus, the normal, political restraints will be operative in considering such legislation. There are no such restraints, however, in relation to an out-of-State firm having neither property nor representatives within the jurisdiction. The State or subdivision asserting extraterritorial power feels no concern for the burdens imposed upon out-of-State businesses. The costs will be borne outside its borders. The persons affected by the burdens are not heard in the democratic process. Consequently, there is temptation to raise money at their expense, heedless of the damage.

It is a function of the due process and commerce clauses to bar such attempts to enrich the people of one State at the expense of the people of another. "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the State legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." (*South Carolina Highway Dept.* v. *Barnwell*

Bros., 303 U.S. 177, 185, n.2) See, also, *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46, n.2. "Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation" (*Nippert* v. *Richmond*, 327 U.S. 416, 434). ". . . the real victims of the statute are deprived of the opportunity to exert political pressure upon the . . . legislature in order to obtain a change in policy" (*Edwards* v. *California*, 314 U.S. 160, 174). Although the cases cited involved the application of the commerce clause, the underlying principle is equally important in determining whether there is sufficient nexus to support tax obligations. *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 957, 962 (1962).

The present controversy exemplifies the constitutional defect mentioned in the last cited cases. The voices and votes of out-of-State mail-order businesses will not be heard in the States where they have only customers, and their interests are of scant concern to those States because any damage is done in another jurisdiction. Gaining no benefits and having no voice or representation within the jurisdiction, they cannot fairly be taxed.

The exclusively out-of-State business differs in these two essential respects from the mail-order seller which maintains stores or salesmen within the jurisdiction. Businesses with local retail outlets obviously derive benefits from the local government. A seller with a local sales force enjoys much the same protection. His salesmen use the State's highways, enjoy its police protection and carry on their business activities within the sphere of local concern substantially as if they were doing local rather than interstate business. In return for these benefits the seller may fairly be expected to carry a share of the cost of government. An exclusively mail-order business, on the other hand,

creates no local problems and receives none of the local benefits supporting tax obligations. Similarly, the concern with a local establishment or local sales force may exert influence in local political processes. Its activities and expenditures are part of the local common wealth with which the government must be concerned. Its supervisors and salesmen may live and work in the jurisdiction. By definition it has a number of representatives within the State who, if the management wishes, can deal with the problems of local taxation. Although one can posit cases where the presence of local representatives is scarcely more contact than that of the exclusively out-of-State seller, the situation of most businesses with a local sales force is much closer to that of the firm with a local establishment. Taking those businesses as a group their situation is radically different from that of mail-order houses with neither local representatives nor local outlets.

4. *Local merchants would suffer no significant competitive disadvantage from failure of out-of-State mail order firms to collect the local use tax.*

As a matter of law, the Constitution bars a State from enforcing measures aimed at equalizing the costs of in-State and out-of-State businesses. *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511. The chief occasion of the adoption of the Constitution was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII.

In fact, the argument that inability to require out-of-State sellers to collect use taxes would put local merchants at a competitive disadvantage is greatly exaggerated. Any differential between tax-free sales and sales subject to the use tax may be reduced or eliminated by the difference

in the other tax burdens imposed by the seller's home State. Although it noted that out-of-State mail-order houses offering goods available in local stores may have some tax advantage, the Special Subcommittee observed—

> All in all, it would seem that the majority of specialized mail-order operations are such that there is little competitive reason for requiring them to collect sales tax. When this is coupled with the problems of collecting the tax which confront all of these businesses that sell for cash, it becomes difficult to find any justification for a State's imposing its collection requirements on companies of this kind.

Thus, the Subcommittee concluded, with respect to specialized mail order operations, that there is "little competitive reason for requiring them to collect sales tax," and that, with respect to all out-of-State mail-order firms, it is difficult to find "any justification for a State's imposing its collection requirements on companies of this kind." *Report* 774. Its net conclusion was that limiting liability for the collection of use taxes to sellers having a permanent place of business within the taxing State would leave "little room for a flight of purchases with significant revenue consequences." *Report* 884. *A fortiori*, rejection of Illinois' attempt to tax wholly out-of-State mail-order businesses does not leave local retailers at a significant competitive disadvantage.

In summary, then, the decision below violates basic constitutional principles. A mail-order sale is the purest form of interstate commerce. There can be no transaction with Illinois residents in which the seller has less contact with Illinois than upon a mail-order sale by an out-of-State firm. The only remaining step would be for Illinois to tax all interstate contact with her people. The Illinois statute

imposes a heavy and discriminatory burden upon interstate commerce because the extraterritorial character of the obligation inevitably means that many other States will impose the same kind of duty upon the same mail-order firm. Such firms gain no local benefits in return for which a local tax may fairly be imposed. The out-of-State mail-order houses have no remedy in internal political processes. The extraterritorial obligation is not needed to protect local merchants or State revenue. On principle then, as well as on precedent, the decision below should be reversed.

C. The Settled Limitations Upon Jurisdiction to Require Extraterritorial Collection of a Use Tax Should Not Be Disturbed Without Congressional Action.

Even if the point were otherwise doubtful, the Court should not now disturb the distinction between (a) businesses with local representatives or related local outlets, which may be subjected to liability to collect use taxes, and (b) exclusively out-of-State businesses, which are immune. This conclusion is impelled by four considerations.

First, the line of distinction is drawn by the decisions of this Court. See pp. 15-21 above.

Second, the distinction is firmly embedded in business practice and use tax administration. After studying the 4,203 firms covered by the 1963 Census of Business, the Special Subcommittee found that the large catalog houses which maintain nationwide retail outlets pay local sales or use taxes because the outlets confer jurisdiction, while smaller firms pay sales or use taxes in their home States and if, like appellant, they own a few retail outlets, they also pay the tax in those jurisdictions. The Subcommittee also found, however, that among this group (*Report* 772)—

> Collection or payment of sales tax in a state where a firm does only mail-order business is virtually unknown.

Some $1.3 billion in mail-order sales and all but a handful of the 4,206 firms covered by the 1963 Census of Business fall in this category.

Out-of-State department stores which generate mail order sales by newspaper advertisements or seasonal catalogs (*e.g.* Macy's, Harvard Cooperative Society and F.A.O. Schwarz) do not collect use taxes upon mail-order sales in interstate markets. With respect to them the Subcommittee found (*Report* 772)—

> Tax is charged on these sales only in States where the firm has a retail outlet . . .

The remaining mail order sales are made by firms selling specialty products, like Vermont maple syrup, Wisconsin cheeses, or the books of the Sierra Club. In an effort to discover the practice of these small enterprises the Subcommittee studied 815 mail-order advertisements in periodicals having national circulation. Only 20 of the 815 advertisements even mentioned a sales tax. Not even one advertisement stated the rate for more than one State; presumably the one tax mentioned in the 20 out of 815 advertisements was for the home jurisdiction. (*Report* 773). The inescapable inference is that these firms, too, have not been acting as tax collectors for other States.

Sales tax administrators, although anxious to extend sources of revenue, have largely accepted the distinction between firms with and without local representatives. "Where the seller's only contact with the State is advertising, most States indicated that they do not in practice assert liability; less than one-fourth of the sales tax

States appear to rely on one form or another of this contact." (*Report* 630). Most of the assertions of liability appear to be only nominal. So far as we can discover only two States—Alabama and Illinois—have actively challenged the accepted rule. In Alabama the Supreme Court rejected the challenge on the ground that the constitutional decisions of this Court preclude requiring collection of a local use tax by an out-of-State business. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 S.2d 91 (1965). If the decision below is affirmed, there will undoubtedly be wider efforts to require out-of-State collections. In terms of present practice, however, collection and efforts to enforce collection are virtually unknown.

Third, overturning the foregoing practice will impose liability for uncollected use taxes for past years upon thousands of out-of-State businesses, large and small, even though none of them made collections from their mail-order customers. They would be required to defend collection suits brought in many different localities, often far from their only offices, employees and records, in States in which they never did business and where the only service of process was upon a State official and notice by registered mail. The judgment against appellant is of this character. Although these facts may not make out a technical case of retroactive liability,[21] they furnish strong

[21] We submit that the technical case is made out with respect to the portion of the judgment below covering taxes on mail order sales based upon catalogs sent by appellant into Illinois prior to the enactment of the Illinois Use Tax Act on July 17, 1961. This is the provision which attempts to make soliciting orders within the State by any form of advertising the basis for an obligation to collect the use tax from Illinois purchasers. Shortly before that date appellant had already sent out its regular semi-annual catalog. Many of the sales on which Illinois now seeks to collect the tax were thus based upon advertising, omitting mention of the tax, which it was too late to recall. Nevertheless, the judgment below covers alleged taxes on all sales after July 17, 1961. (R. 6).

reason for adhering to the rule indicated by such cases as *Miller Bros.* v. *Maryland*, 347 U.S. 340 and *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359.

Fourth, there is strong congressional opposition to any further extension of State power to impose tax obligations upon interstate traders soliciting orders within a jurisdiction. The opposition should carry weight because, under the commerce clause, the will of Congress is controlling and the function of the Court, in the absence of legislative action, is to supply that rule which is most consistent with the presumed legislative intent. *Cooley* v. *Board of Wardens*, 12 How. 299; *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408; *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456; cf. *In Re Rahrer*, 140 U.S. 545. And although Congress may not always have the final word as to what constitutes due process in jurisdiction to tax, its judgments, expressed in either action or inaction, carry great weight. *State Board of Insurance* v. *Todd Shipyards Corp., supra*, at 457-458; compare *Katzenbach* v. *Morgan*, 384 U.S. 641.

Congressional skepticism concerning the extension of State taxation of interstate commerce to areas where the interstate trader has slight, if any, contact with a State, was first expressed immediately following the decision in *Northwestern Portland Cement Co.* v. *Minnesota*, 358 U.S. 450. Congress immediately enacted legislation which forbade any State or political subdivision to tax the income of a business derived from interstate commerce if its only activities within the taxing State were the soliciting of orders to be filled by interstate delivery after approval or rejection outside the State. Act of September 19, 1959, 73 Stat. 55 (1959). As applied to mail-order sales the act shows it to be congressional policy that sending catalogs to local customers and filling orders from outside a State—the only kind of contact appellant has with Illinois—is not

a sufficient nexus to support the imposition of a net income tax.

Following *Scripto, Inc.* v. *Carson*, 362 U.S. 207 a bill was introduced to overrule the decision. S. 3549, 86th Cong., 2d Sess. The Senate Finance Committee recommended broadening the scope of a study to be made by the special Subcommittee of the House Committee on the Judiciary on State Taxation of Interstate Commerce authorized by prior legislation. S. Rept. 1574, 86th Cong., 2d Sess. Such a bill became law at the next Congress. Act of April 7, 1961, 75 Stat. 41.

The Special Subcommittee concluded that even the present system "works badly for both business and the States . . . The result is a pattern of State and local taxation which cannot be made to operate efficiently and equitably when applied to these companies whose activities bring them into contact with many States" (*Report* 1127). Manifestly, the inefficiencies and inequities would be greater if nationwide responsibility for collecting use taxes under divergent State and local laws were extended to mail-order houses too small to maintain retail outlets or send solicitors into a jurisdiction, merely on the basis of their distribution of advertising and shipment of goods. The *Report* continued (R. 1128):

> For the company selling in interstate commerce, the likelihood that it will be caught up in the troubles of the system becomes greater with increased exposure through the passage of time and the widening spread of its activities. • • •
>
> • • • the interests of the nation in a free flow of commerce, unhampered by needless interference, clearly call for a change.

The Subcommittee initially recommended that jurisdiction to require the collection of sales or use taxes be limited to situations in which the seller maintained a permanent business location within the State, except when the State entered into a cooperative arrangement, meeting prescribed tests, that would eliminate the burden of complying with the diverse obligations imposed by widely variant State legislation. As applied to mail-order houses, the jurisdictional limitation would conform to the line indicated by the decisions of this Court. *Report* 1177-1187.

After further hearings, the Subcommittee dropped the proposal for a cooperative arrangement. Its Chairman, Mr. Willis, and many of its members introduced identical bills limiting the power of States to collect use taxes upon mail-order sales to situations in which the seller maintained a "business location" within the jurisdiction. H.R. 16491, 89th Cong., 2d Sess. (1965), Section 101(2). Section 511 defines the term "business location" to apply only to a person which owns or leases real property or has one or more employees located within the State.[22]

The House Committee on the Judiciary thereafter submitted a favorable report on the Willis Bill, with only one of its 35 members dissenting. H.Rept. 2013; 89th Cong., 2d Sess. (1966). While one cannot forecast the ultimate action of Congress, the bipartisan and almost-unanimous recommendation of the House Judiciary Committee, reached after long and careful study, is a highly persuasive indication of what the Congress judges the national interest to require.

Under these circumstances, we submit, the established

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[22] In addition, Section 301 of the bill would permit the seller's State—not the buyer's State—to collect a tax for the State of destination. There is no way of predicting how far such bilateral arrangements may be negotiated between the States. They would eliminate most of the evils inherent in Illinois' present position because sellers would deal with only one taxing authority under one sales tax law.

pattern should not be upset by extending the States permission to require out-of-State firms to collect use taxes upon so tenuous a contact as advertising followed by interstate shipments by common carrier or the United States mails.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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Appendix A

STATUTES INVOLVED

A.) The ILLINOIS USE TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 439.1 *et seq.*), insofar as it is sought by plaintiff to be applied to defendant in the attendant circumstances. The Court's attention is directed especially to Sections 2, 3, 3a, 5, 6, 7, 8, 9, 12, 12a and 14 of such Act.

Section 2 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.2, as amended by the Act of July 17, 1961):

> "*439.2 Definitions.*] § 2 'Use' means the exercise by any person of any right or power over tangible personal property incident to ownership of that property, * * *. 'Use' shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property * * *.
>
> " 'Purchase at retail' means the acquisition of the ownership of or title to tangible personal property, through a sale at retail.
>
> " 'Purchaser' means any person who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.
>
> " 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for use and not for resale in any form as tangible personal property, for a valuable consideration.* * *.
>
> "* * * * * *
>
> " 'Retailer maintaining a place of business in this State,' or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising whether such orders are received or accepted within or without this State."

Section 3 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 110, § 439.3):

"*439.3 Tangible personal property purchased at retail—Use tax—Rate—Collection and remittance—Exceptions.*] § 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Such tax is at the rate of 2½% of the selling price of such property if purchased before July 1, 1959, or after June 30, 1965, and at the rate of 3½% of the selling price of such property if purchased after June 30, 1959, and prior to July 1, 1965 * * *

"The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *, and remitted to the Department [of Revenue], pursuant to the provisions of Section 9 hereof.

"The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

"Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. * * *

"* * * * * *"

Section 3a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.3a):

"*439.3a Method of stating tax.*] § 3a. Wherever possible the tax imposed by the Act shall when collected be stated as a distinct item separate and apart from the selling price of the tangible personal property.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.5):

"*439.5 Receipts—List of agents.*] § 5. * * * every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made in or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser, give to the purchaser (if demanded by the purchaser) a receipt therefor in the manner and form prescribed by the Department [of Revenue]. * * *."

Section 6 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.6):

"*439.6 Certificate and Sub-Certificate of Registration—Separate certificates—Foreign retailers—Permit to collect tax.*] § 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, * * *. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department [of Revenue] (upon a form prescribed

and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the applicant states in his application to be the principal place of business or location from which he will act as a retailer in this State. * * *. No Certificate of Registration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

"The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements * * * as a retailer maintaining a place of business within this State. * * *."

Section 7 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.7):

"*439.7 Direct or indirect advertisement that retailer will absorb tax prohibited—Penalties.*] § 7 It is unlawful for any retailer to advertise or hold out or state to the public or any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof will be assumed

or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a claim filed with the Department [of Revenue] under the Retailers' Occupation Tax Act or under this Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act."

Section 8 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.8):

"*439.8 Tax collected as debt owed to state—Exception.*] § 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [of Revenue] by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction."

Section 9 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.9):

"*439.9 Due date—Conditional sales—Refunds—Joint and separate returns—Fund.*] § 9 * * * each retailer required or authorized to collect the tax herein imposed shall pay to the Department [of Revenue] the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, whichever is greater, which is allowed to reim-

burse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request. * * *.

"* * * * * *"

Section 12 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12):

"*439.12 Applicable sections and exceptions.*] § 12. All of the provisions of Sections 2a, 2b, 3, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c, 5d, 5g, 5h, 8, 9, 10, 11, 12 and 12½, of the 'Retailers' Occupation Tax Act' in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Section 12a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12a, as added by the Act of July 25, 1961):

"*439.12a Appointment of secretary of state for service of process—Force and effect of service.*] § 12a. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as

a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like, true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

"Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit."

Section 14 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 14):

"*439.14 Violations—Penalties.*] § 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of Section 9 or Section 10 hereof, or who fails to keep books and records as required herein, or who files a fraudulent

return, or who wilfully violates any rule or regulation of the Department [of Revenue] for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

"Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

"* * * * *"

"This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupational Tax Act."

B.) The ILLINOIS RETAILERS' OCCUPATION TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 440, *et seq.*), insofar as it is sought by appellee to be applied to appellant in the attendant circumstances.* The Court's attention is directed especially to Section 5 of such Act.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 444):

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*In this regard, see Section 12, Illinois Use Tax Act, *supra*.

"444. *Failure to make return—Failure to pay tax.*]

* * * * * * *

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return, the Department [of Revenue] shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. * * *. The Department shall notify such person or his legal representative, as such, as provided in this Act, of the amount of tax so computed, stating that it proposes to assess such amount together with a penalty of 25% thereof. * * *. If a protest to the proposed assessment and a request for a hearing thereon is not filed 20 days after notice of the proposed assessment, the Department shall issue a final assessment to such person or to the legal representative of such person.

"* * * * *"

Appendix B

The Impact of an Obligation to Collect Use Taxes upon the Operations of Mail-Order Houses

The actual impact of sales and use tax laws upon interstate commerce, including mail-order transactions, has recently been the subject of detailed study by a Special Subcommittee of the House Committee on the Judiciary. Following the decision in *Northwestern Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, Congress enacted legislation which forbade any State or political subdivision to tax income derived from interstate commerce by a business whose only activities within the State were the solicitation of orders, subject to approval or rejection outside the State, to be filled by interstate delivery. The same statute authorized the House Committee on the Judiciary and the Senate Committee on Finance to make full studies of State taxation of income derived from activities in furtherance of interstate commerce. Act of September 14, 1959, 73 Stat. 555 (1959). In 1960, following the decision in *Scripto, Inc.* v. *Carson,* 362 U.S. 207, a bill was introduced to bar the States from requiring out-of-State firms to collect use taxes upon interstate sales solicited by local brokers. S. 3549, 86th Cong., 2d Sess. The Senate Finance Committee reported out a bill which expanded the study authorized by the Act of September 14, 1959 to include the impact of State and local sales and use taxes. S. Rept. 1574, 86th Cong., 2d Sess. The bill died in the 86th Congress but was revived and enacted as the Act of April 7, 1961, 75 Stat. 41 (1961). The study was conducted by a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives. Hearings were held during the 87th Congress. Reports were published during the 88th and 89th Congresses.

The reports most relevant to the present case are H. Repts. 565 and 952, 89th Cong., 1st Sess. (1965).

An enormous volume of interstate sales are transacted by the vendor's use of local outlets or solicitors. The Subcommittee's study covered the impact of use-tax collection upon the three largest groups: (A) industrial retailers, which sell machinery and office equipment for consumption by other business establishments; (B) border retailers; and (C) mail-order houses, which send catalogs and other advertising to prospective customers, nationwide or regionally, and then ship any ordered merchandise by common carrier or the United States mail. *Report* 760-774. Although the Subcommittee's conclusions sometimes lump two or three of these divergent types of business into one generalization, we are here concerned only with mail-order houses.

The Subcommittee found that, according to the Census of Business for 1963, there were 4,206 mail-order establishments making almost $2.4 billion in sales. Five catalog houses, which also have retail outlets in almost every State, account for $1.1 billion. They collect use taxes because of their local outlets. The other 4,200 establishments have never collected use taxes, except in States where they have offices, warehouses, and, occasionally, retail stores. The businesses in the latter group vary greatly. Very few have any retail stores. Some are of moderate size. Most are small, even part-time operations. Some, like appellant, carry a broad range of items. Others are specialty houses. Many cater to people seeking gifts for Christmas or birthdays, or to special groups, such as horsemen and yachting enthusiasts.

Two other types of mail-order businesses, not covered by the Census but described in the Report, are potentially affected by use tax legislation: department stores, which generate mail-order sales by newspaper advertisements or

seasonal catalogs (*e.g.* Macy's, Harvard Cooperative Society and F.A.O. Schwarz); and a host of speciality houses too small and scattered to appear in the census. The Book-of-the-Month Club and similar enterprises distributing both books and phonograph records rely heavily, when not exclusively, upon this form of sale.

The Special Subcommittee made a detailed cost study covering one hundred companies. *Report* 53-63, 783-813. Although the cost study pinpoints many facets of inquiry, it has only limited value with respect to the impact upon out-of-State mail-order firms of Illinois' assertion that interstate advertising plus delivery to the mails or common carriers is a sufficient nexus to support imposing upon the out-of-state sellers an obligation to collect its customers' use tax. In the first place only 18 of the 100 firms studied were retailers. All average figures, therefore, are very heavily weighted by the comparatively large taxable size of the average manufacturer's sale. Costs of collection are generally higher for businesses with small average sales. Appellant's average sale is approximately $10. The second factor limiting the value of the study is that the firms studied were collecting use taxes for comparatively few States. Half the participants were making collections for less than four States. Three-quarters of the participants were making collections for less than eight States. *Report* 795. The proposition asserted by Illinois would subject a mail-order business to the costs of making collections for every State in which it had customers, which would nearly always be more than seven and would often be as many as fifty States. The study shows that as the number of States demanding the tax from a firm increases, the costs of collection rise in relation to gross receipts. This is the effect not only of multiplicity but of the higher costs when a larger proportion of the company's sales are subjected to tax. Finally, it must be remembered that any

mail-order firms reflected in this study as making collections for more than four States would have been among the larger concerns because mail-order firms are still making collections only for the home State and any other jurisdictions in which they maintain retail outlets.

At present, collection and payment of use taxes are virtually unknown where the seller does only a mail order business. *Report* 772. Reliable inferences can be drawn, however, partly from analysis of the statutory obligations as applied to the details of mail-order operations and partly from the experience of those houses which are required to, and do, collect use taxes on mail-order sales into States in which they also maintain retail outlets. The impact varies according to the size and nature of the business, bearing most heavily upon the smallest enterprises, but the burdens of acting as a use tax collector are invariably heavier for the out-of-state mail-order seller than the local retail store. *Report* 771, 812.

To illustrate the Subcommittee's findings on these points in specific detail we add examples based upon appellant's experience. Since the case comes up on a motion for summary judgment and appellant's costs were not developed in the record, the information is offered only by way of illustration of matters in the Subcommittee Report.

Sales and use taxes are imposed on sales, not on collections, and the Illinois tax here was assessed on that basis. (R. 2). Such statutes in effect forbid a retailer himself to absorb the tax by paying it (*e.g.*, Ill. Rev. Stat. [1963], Ch. 110, §§ 439.3, 439.7) but, on the other hand, they make no provision for the possibility that the retailer may not be able to collect the tax. Where the local retailer faces a tax-resisting customer personally, he can resolve this dilemma by declining to consummate the sale unless the tax is paid. The cost to him is simply one sale lost, and such confrontations with consumer resistance to sales tax no

longer arise. But the situation of the mail-order retailer is vastly different because the customer is miles away; and his costs, in the collection of taxes, are many times greater.

Those firms which must attempt to collect the sales-use tax in their home States, where their receipt of the benefits of local government makes it just to require them to contribute to its support, know this from experience. One owner of a small mail-order business testified before the Subcommittee that he was unable to collect 75 percent of use taxes. One of the major specialty houses had a 57 percent rate of non-collection; another had a 42 percent rate. The experience of some of the other firms was somewhat more favorable but the Subcommittee cites no instance in which the non-collection rate was less than 30 percent on cash sales. The result, as the Subcommittee observed, "is to cut into what already may be a modest margin of profit on those sales." *Report* 771.

Appellant's own experience bears out these conclusions; it also reveals the reasons. Appellant has retail stores in Alabama, Kansas and Mississippi and therefore acknowledges its liability for the collection of use tax on mail-order sales in those States. But actually recovering the tax from the distant mail-order customer, on a cash sale, is a problem fraught with a succession of costly hurdles. Initially, orders are received, in the main, from customers who were circularized, and these customers normally employ the order blank furnished with the catalog. That order blank contains a reminder (and the percentage) of tax due, and a space in which to calculate the correct amount. Nevertheless, of such orders 22 percent omit the tax.

In addition, there are "repeat" orders from customers, and orders from relatives, friends and neighbors who have been shown appellant's catalog and flyers. These orders come in on the customers' own note-paper. Of these orders over 70 percent fail to include any tax.

When the order reaches appellant, acting as tax collector requires a number of different kinds of additional handlings, or "sorts", in order to make or check this added calculation. Decisions must be made upon whether the deficient order shall be rejected, or the customer billed, or the deficiency ignored because a communication requesting payment would cost more, for printing, inserting, check and postage, than the tax. Only 20 percent of the payments requested are collected—*i.e.*, 80 percent of those billed for deficiency in tax do not pay.

Thus, the appellant winds up by failing to collect approximately 40 percent of the use taxes due on cash sales in the three States in which it attempts to collect use taxes.

The collections vary somewhat among the States. For example, in Mississippi almost 50 percent of the orders fail to enclose the tax. However, in Missouri where appellant's offices and warehouses are located, appellant succeeds in collecting about 80 percent of the tax. The principal explanation for this more favorable local experience appears to be that tax is being collected by an in-State concern from in-State buyers.

Loss of sales and unnecessary labor. Inability to collect payment is only the beginning of the costs of collection for the mail-order seller. Where a remittance is short the tax, the seller immediately has problems and must make choices. A local store-keeper may simply reject the sale, without expense. It costs appellant 11 cents, out-of-pocket per item ordered, in addition to loss of profit, to reject, or "cancel", a sale. The mail-order business depends on handling a large volume of orders simply. For the house with a broad line of merchandise, the key is volume and, if possible, the seller must salvage every possible sale. First, he segregates those orders where the customer is established, or the sale is of such size, or the deficiency of

such amount, that the preferred risk is to fill the order and bill the customer. Already the seller will have incurred a number of extra costs—an additional operation in sorting these orders, and a letter, with a bill—not to mention the ultimate statistical experience that not all the tax billed will be collected. Or he can "back-order" or "hold" the order, writing the customer for the deficiency. This method, of course, only delays decision, and increases the cost, for the order is handled twice. It costs fifty cents for each item of an order which is back-ordered. Hence, in the final analysis, on single-item orders the choice is (a) to fill and bill; or (b) to cancel and refund; or (c) to back-order. All three are costly, although in the first case at least some profit on a sale has been secured.

Multi-item orders are even more difficult. Here another choice is presented—to refrain from filling some one of the items for which the customer has tendered an amount sufficient, if diverted, to pay the tax on the other items. This entails, at best, still more "handling" operations: (a) someone must decide which item to eliminate; (b) someone must calculate and mark the order to show the net difference; and (c) since the item cancelled and the tax deficiency rarely balance, someone must make out a refund check and transmit it to the customer.

This is not the end of the seller's costs. For example, if the tax is 93 cents and a $1.00 item is cancelled, the refund is 7 cents. However, the seller, striving to lose no sale, however small, is also ruefully aware that in a multi-item order, some item or items may be out of stock. If he has cancelled a $1.00 item and then finds that a 98 cent item is out of stock, he will have unnecessarily cancelled the $1.00 item and thus have lost a sale on two items—one unnecessarily. To avoid this, when the remittance is deficient, an order is "red-flagged" while being filled. When it has been filled to the extent possible and is ready

for mailing to the customer, it is reexamined just before mailing (this is the purpose of the "red-flag") to see if out-of-stock items were ordered in amounts sufficient to make up the tax deficiencies. If so, no other items are cancelled; otherwise an item is cancelled and the goods must be carried back to stock. Of course, the seller has again been required to add a number of additional operations, each fractionally but inexorably adding to the cost of handling orders.

Since the mail order business depends upon processing a large volume of sales simply, and therefore cheaply, these additional handlings and exchanges of letters on any substantial number of orders entail enormous expense.

Computation of the tax. The Illinois doctrine would also subject out-of-State sellers to much heavier burdens than local merchants in computing, as well as collecting, the tax. A retail store deals with one set of customers under the laws of a single State. A mail-order house normally receives orders from a number of States. Many houses have a nationwide business and thus receive orders from as many as fifty States—as does appellant. The extent of the burden was graphically described by the Chairman of the Special Subcommittee (112 Cong. Rec. (September 30, 1966) A 5055):

> If it were to anticipate shipping its products into any State, city, county or hamlet from which it received an order, it would require a compilation of 80 volumes of State and local tax laws which reaches more than 22 feet in height when piled one on the other.

In practice the seller would have to make separate computations on each order according to the customer's residence. Sales and use tax rates vary from State to State; there are eight different current rates: 2, 2 1/4, 2 1/2, 3,

3 1/2, 4, 4.2 and 5 percent.[1] The computation is a burden even where a firm collects a sales tax for its home State and the two or three States in which it may have outlets; but if the liability is extended, "sizable firms with broad lines may have to break down their order processing to enable clerks to specialize in groups of states" *(Report* 771).

Most frustrating are the problems presented by statutory exemptions from tax. The wide variation in exemptions presents literally insoluble problems. Eleven States, for example, exempt food and beverages.[2] Three exempt all clothing and shoes, and one children's clothing and shoes.[3] A few exempt books—a few more exempt only Bibles.[4] One exempts soap and cleansing products (but not for the teeth and beard). In the field of medicines—prescriptions, household drugs, etc. the multiplicity of different exemptions would present staggering problems to mail-order firms. Thus fourteen States exempt prosthetics and medical aids,[5] and one exempts patent medicines;[6]

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[1] See p. 26, n. 15, above.

[2] In the following compilations, the District of Columbia is counted as a state. Cal. Rev. & Tax Ann. Code § 6359; Conn. Gen. Stat. Ann. § 12-412(m) (1958); Fla. Stat. Ann. § 212.08(1) (Supp. 1965); Me. Rev. Stat. Ann. tit. 36, § 1760(3) (1964); Mass. Retail Sales Tax, §§ 1(6)(h), 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-056, 43-212 (March 15, 1966); N. J. Stat. Ann. § 54:32B-8(b) (Supp. 1966); N. Y. Tax Law § 1115(a)(1); Ohio Rev. Code Ann. §§ 5739.02(B)(2), 5741.02(C)(2) (Page Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(u) (1964); R. I. Gen. Laws Ann. § 44-18-30(J) (1956); Tex. Tax Gen. art. 20.04(K) (Supp. 1966).

[3] Conn. Gen. Stat. Ann. § 12-412(j) (1958) (children's clothing only); Mass. Retail Sales Tax §§ 1(6)(k), 2(5)(b), 3 CCH Sales Tax Rep. §§ 43-059, 43-212 (March 15, 1966); N. J. Stat. Ann. § 54:32B-8(d) (Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(q) (1964).

[4] Md. Ann. Code art 81, §§ 326(s), 375(b) (1965).

[5] Colo. Rev. Stat. Ann. § 138-5-14(f), as amended by H. B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para. 26-064 (July 8, 1965)); Conn. Gen. Stat. Ann. § 12-412(a) (1958); D. C. Code Ann. §§ 47-2605(p), 47-2706(b) (1961); Fla. Stat. Ann. § 212.08(2)

many exempt prescriptions but not "household drugs".[7] A pharmaceutical firm doing retail mail order business in California, New York and Illinois—three of our most populous States—finds, for instance, that California exempts prescriptions, but not prosthetics, household drugs or medical supplies;[8] that New York exempts household drugs, prosthetics and medical aids and that Illinois exempts none.[10] To complicate matters further, some exemptions attach not to the item but to the status or character of the customer (charitable hospital institutions, orphanages, etc.). In order to achieve strict compliance, the mail-

(Supp. 1965); Mass. Retail Sales Tax, §§ 1(6)(l), 2(5)(b), 3 CCH Sales Tax Rep. paras 43-060, 43-212 (March 15, 1966); Md. Ann. Code art. 81, §§ 326(m), 375(b) (1965); N. J. Stat. Ann. § 54:32B-8(a) (Supp. 1966); N. Y. Tax Law § 1115(a)(4); N. C. Gen. Stat. § 105-164.13(12) (1965); Ohio Rev. Code Ann. §§ 5739.02(B)(22), 5741.02(C)(2) (Page Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(m) (1964); R. I. Gen. Laws Ann. § 44-18-30(L) (1956); Tex. Tax-Gen. art. 20.04(L) (Supp. 1966); Va. Retail Sales and Use Tax, § 58-441.6(a) (4 CCH Sales Tax Rep. para 73-153 (March 29, 1966)).

[8] R. I. Gen. Laws Ann. § 44-18-30(K) (1956). Four other states exclude "non-prescription" medicines, which appear to be the same as R. I.'s "patent" medicines: D. C. Code Ann. §§ 47-2605(o), 47-2706(b) (1961); Fla. Stat. Ann. § 212.08(2) (Supp. 1965); Md. Ann. Code art 81, §§ 326(l), 375(b) (1965); N. Y. Tax Law § 1115(a)(3).

[7] Cal. Rev. & Tax Ann. Code § 6369; Colo. Rev. Stat. Ann. § 138-5-14(f), as amended by H. B. 1119, Laws 1965 (2 CCH Sales Tax Rep. para 26-064 (July 8, 1965)); Conn. Gen. Stat. Ann. § 12-412(d) (1958); Ind. Ann. Stat. §§ 64-2654(b)(13), 64-2658 (Supp. 1966); Me. Rev. Stat. Ann. tit. 36 § 1760(5) (1964); Mass. Retail Sales Tax, §§ 1(6)(l), 2(5)(b), 3 CCH Sales Tax Rep. paras. 43-060, 43-212 (March 15, 1966); N. J. Stat. Ann. § 54:32B-8(a) (Supp. 1966); N. C. Gen. Stat. § 105-164.13(13) (1965); N. D. Cent. Code Ann. §§ 57-39-03.7, 57-40-03 (1960); Ohio Rev. Code Ann. §§ 5739.02(B)(22), 5741.02(C)(2) (Page Supp. 1966); Pa. Stat. Ann. tit. 72, § 3403-203(m) (1964); Tex. Tax-Gen. art. 20.04(L) (Supp. 1966); Va. Retail Sales and Use Tax § 58-441.6(a) (4 CCH Sales Tax Rep. para. 73-153 (March 29, 1966)).

[8] Cal. Rev. & Tax Ann. Code § 6369.

[9] N. Y. Tax Law §§ 1115(a)(3), 1115(a)(4).

[10] Ill. Ann. Stat. ch. 120 § 439.3 (Smith-Hurd Supp. 1966).

order firm which shipped catalogs and goods throughout the interstate market would have to check the items of each order against the exemptions in each customer's State. On sales to Wisconsin residents, the procedure would have to be reversed—Wisconsin itemizes what it taxes and not what is exempt.[11]

Checking the exemptions allowed by each State against the individual items in each order received from one of its residents and then calculating the correct amount of tax would be ruinously expensive for any business with a significant range of exempt as well as non-exempt items. The mail-order business depends upon being able to break down the handling of a large volume of orders into a simple series of readily separable steps. Appellant, since it sells chiefly soft goods and standard appliances and merchandise, carries only a small proportion of exempt items, but even in this case figuring the exemptions for its home State and the three States in which the operation of local stores subjects appellant to tax liabilities, would be so burdensome that appellant is driven to ignore exemptions unless the customer claims them.[12] The same course could scarcely be followed by mail order businesses offering a larger proportion of tax-exempt items. Nor is it a satisfactory disposition of the burdens resulting from imposition of multi-State, extraterritorial obligations to say that they can be made tolerable by disregarding integral parts of the very statutes that the States are seeking to enforce.

Records and Audits. Application of use tax to mail-order sales would require, for report and audit purposes, entering and maintaining separate records for every State so choosing in which customers were located. Every sale

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[11] Wis. Stat. Ann. §§ 77.52, 77.53(1) (Supp. 1966).

[12] The State, and not appellant, is the gainer, for the tax (whether or not collected) is paid over.

would have to be entered, together with the resulting tax, in the ledger appropriate to the State of the customer's residence. Twenty-eight sales tax States require monthly returns; fifteen require returns quarterly.[13] This volume of paperwork is not required of a local merchant for he deals with only a single State. In addition, the sales and use tax laws require a seller to keep elaborate supporting records to be furnished, upon audit, to verify the payments.[14] To undergo multiple audits for different States would be time-consuming and prohibitively expensive. Sometimes compliance would be impossible without closing the establishment; for example, if a State demanded (as some laws provide) that the original books of account be delivered to the State authorities for audit.[15] A mail-order enterprise could not function without its books—assuming they could be delivered. Sometimes literal compliance would result in conflicting obligations; for example, where two States request delivery of the books of account at the same time. Other States permit a retailer to choose an office audit, if he will pay the expenses thereof. The cost of the travel and living expenses, and fees of auditors (usually two) from any number of States would be ruinous.

The burden of record-keeping can be eliminated only by non-compliance—which is in fact what is done in practice. Appellant keeps accurate statistical information for internal purposes from which it can draw reliable esti-

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[13] See p. 27, n. 17 above.

[14] As every mail order customer knows, the customer's order is returned with the shipment. If the order is to be retained for a supporting record, a duplicate must be made—at enormous added cost on a volume of millions of orders.

[15] *E.g.*, Cal. Rev. & Tax Code § 7053, Tax Board Ruling No. 2098, 2 CCH Sales Tax Rep. par. 24-634 (1936); Fla. Stat. Ann. § 212.13(2) (Supp. 1965); Ill. Stat. Ann. § 439.11 (Smith-Hurd Supp. 1966) and Article 7 of the regulations of the Illinois Department of Revenue, 2 CCH Sales Tax Rep. par. 34-507 (1966).

mates of the volume of sales by States. The States in which appellant has stores or property accept those estimates, and the statutory duty to keep accurate records is ignored. Perhaps a few other firms could follow the same practice, but there are thousands which could not make reliable returns acceptable to tax collectors without keeping new, separate records for every State in which their customers were located. Nor does it eliminate the constitutional relevance of the onerous, extraterritorial consequences of a statute to show that they are so plainly too burdensome that even the officials charged with enforcement are forced to overlook violations.

Local taxes. The theory of the decision below would render a mail-order house with a single location liable to collect and pay over use taxes for literally thousands of counties, municipalities and even school districts [16] which, by virtue of authority delegated by the State, impose sales and use taxes and purport to require out-of-State vendors to make collections.[17] In 1940 only a handful of cities imposed a sales tax. By the end of 1964 the number of sales tax localities had risen to 2,329—2,133 municipalities, 194 counties and 2 school districts located in 15 States. In many instances compensating use taxes are also imposed. *Report* 841-845. Argument is unnecessary to demonstrate the impracticability of sorting orders by the smallest political subdivisions, ascertaining its boundaries and reviewing each order to allocate it territorially, checking the

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[16] In Alabama use taxes are collected by "Police Districts"—the boundaries of which appear not to conform to, but to overlap, counties, towns, or other local subdivisions.

[17] Some localities' ordinances imposing such taxes contain provisions stating that they do not levy a tax "on a bona fide transaction in interstate commerce." Nevertheless, this does not impede their applying their laws to mail-order sales. For example, appellant recently received a demand from Washington Parish, Louisiana, whose officials, apparently following the example of Illinois, had issued appellant a Certificate of Registration though never applied for.

rate of tax, collecting the tax from the customer, keeping appropriate records, and making remittances. On top of all the other difficulties of dealing with hundreds of jurisdictions, even where somewhat simplified by funneling the local taxes through the State's collection machinery there would still remain the problems resulting from the simple fact that the post office address furnished by the customer does not accurately identify the municipality, county or school district in which he lives. The only possible conclusion is fairly stated in the Subcommittee's Report (pp. 882-883):

> Given the broad spread of sales of even small and moderate sized companies, it is clear that if just the localities which now impose the tax were to realize anything like their potential out-of-State registrants, the record-keeping task of multi-state sellers would be *clearly intolerable.*

Local taxes aside, it is impossible to appraise with accuracy the net effect of imposing these discriminatory burdens upon out-of-State mail order businesses under Illinois' theory of nexus. The few very large mail-order houses have had the resources to adapt themselves to seller collection without ruinous cost. The Report noted that, for the major catalog house, "the responsibility to collect sales taxes causes clerical work and some losses" but that the "problems are small when compared to similar problems handled in the regular course of business." *Report* 772. Later, the Subcommittee observed that the compliance costs were "supportable" by most companies then collecting use taxes outside their home States—chiefly industrial retailers and large, catalog houses maintaining nationwide retail outlets. But the Subcommittee added (*Report* 812):

> An exception must be made to this conclusion for the interstate seller in a low volume, low unit price business—typically the small mail order business. . . . No small mail-order house has been found which collected sales tax for more than one or two States; however, the study of cost relationships in other forms of business strongly indicates caution for cost reasons alone toward extension of the collection responsibilities of this special form of interstate seller.

The major catalog houses which could support the compliance costs comprise "only a tiny minority of all mail-order businesses." Report 770. Most of them are already collecting use taxes for the States where their customers reside because of their local operation of retail stores. Efforts to extend jurisdiction to wholly out-of-State firms therefore bear primarily upon the very much larger number of very much smaller businesses. *Ibid.*